IN THE

Supreme Court of the United States

October Term, 1976

No. 76-132

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Petitioner,

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION and BURLINGTON INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT CLARK-SCHWEBEL FIBER GLASS CORPORATION IN OPPOSITION

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Preliminary Statement

This brief is filed in opposition to the Petition for a Writ of Certiorari, filed by Carlyle Michelman, Trustee of Textura, Ltd. in Bankruptcy Proceedings, on July 20, 1976. An extension of time to file this brief until September 10, 1976, was granted to respondent Clark-Schwebel Fiber Glass Corporation ("Clark-Schwebel").

Opinion Below

The opinion of the Court of Appeals is now reported at 534 F.2d 1036.

Questions Presented

1. Whether this Court should review the judgment of the Court below when petitioner does not question the substantive principles of antitrust laws adopted by the unanimous Court of Appeals.

2. Whether this Court should review the judgment of the Court below in order to determine whether that Court's unanimous decision, explained in a twenty-seven page opinion with detailed factual analysis of the record, that the District Court should have granted defendants' motion for a directed verdict and judgment *n.o.v.*, was correct.

3. Whether this Court should review the judgment below in order to overturn traditional standards of appellate review, explicitly reaffirmed by this Court as recently as 1967 (*Neely* v. *Eby Construction Co.*, 386 U.S. 317), and substitute a rule that a Court of Appeals should not exercise its full supervisory function when a District Court has denied a motion for judgment *n.o.v.*

Statutory Provision Involved

Section 2106 of Title 28 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Statement of the Case

While the opinion of Mansfield, C. J., writing for an unanimous court, provides a comprehensive statement of the case, we set forth below an abbreviated factual statement in order to put into proper context certain assertions made by petitioner.

Textura was, in 1965 and 1966, prior to its assignment for the benefit of creditors and subsequent bankruptcy, engaged in the business of converting decorative fiber glass fabrics and other decorative fabrics into draperies for installation in office buildings and homes. Its operating head and plaintiffs' principal witness at trial was Malcolm G. Powrie.

Defendants Burlington Industries, Inc. ("Burlington"), J.P. Stevens and Company ("Stevens") and Clark-Schwebel were the principal suppliers of decorative fiber glass fabrics to Textura during the period in suit (Tr. 122-24).* While Burlington and Stevens are large diversified textile concerns, Clark-Schwebel's sole business is in the weaving of fiber glass fabrics, for both industrial and decorative uses (Tr. 885-86). Its comparative size is re-

* References to "Tr." are to the trial transcript; to "App. A" and "App. B", to the Appendices attached to the Petition for a Writ of Certiorari; and to "PX" and "DX", to plaintiffs' and defendants' exhibits respectively.

flected, *inter alia,* in the fact that Clark-Schwebel did not have a credit department (Tr. 1137) and its President, Mr. Jack Schwebel, and the head of its Decorative Fabric Division, Mr. Ray Nordheim, acted as a *de facto* credit department regarding the matter in suit.

Petitioner describes at length Textura's alleged innovative method of selling direct to business contractors, bypassing traditional middlemen (Pet. pp. 6-10). The Court of Appeals was fully aware of this aspect of Textura's business, which it describes in two pages of its opinion (App. A 3337-38).

Petitioner seeks to develop a theory of motivation for the claimed conspiracy derived from alleged resentment in the industry regarding the supposed innovative method of doing business. However, the record below was entirely devoid of proof that Clark-Schwebel was party to such resentment. On the contrary, the record showed that Clark-Schwebel encouraged Textura's efforts to sell directly to building contractors, by issuing credits (DX AA, DX AB) to help finance the publication of one of Textura's selling tools, a book called "The Engineers' Guide" (PX 1; see also App. A 3337-38); by writing laudatory letters to such contractors (DX AC), and by helping to arrange for cash contributions for promotional purposes from P.P.G. Industries, Inc., a manufacturer of fiber glass yarn (Tr. 1539-40). Moreover, despite petitioner's italicized assertion to the contrary (Pet. p. 11),* there was absolutely no evidence be-

* The record references in supposed support of this assertion all relate to supposed complaints to Burlington; the contention that these complaints provided motivation for Burlington to drive Textura out of business was brought to the attention of the Court of Appeals and fully considered by that Court (App. A 3358-59).

low of complaints by Textura's competitors to Clark-Schwebel about Textura's method of doing business. Petitioner's theory of why Clark-Schwebel would want to drive a customer out of business is thus totally without evidentiary support. The reason for Textura's demise lies elsewhere.

Throughout its existence, Textura by Powrie's own admission was a "financially thin" company (Tr. 645). It chronically was in a deficit working capital position (DX BG; Tr. 2045-46, 2062),* having made a profit greater than $8,000 in only three of the twelve years of its existence. It had an overall loss for the period 1954 through 1965 of nearly $60,000 and a loss of $125,000 for the years 1964 and 1965 alone (DX B). The history of the dealings of each defendant with Textura evidences a long-period of forbearance and of each attempting to work with Textura in its own way in the hope that Textura would eventually become successful.

One of the ways each of the defendants worked with Textura was not to insist upon the terms of sales contracts regarding shipment of goods woven specially for Textura on the scheduled delivery date. Powrie "appreciated" these favorable terms (Tr. 645) and Textura took advantage of the situation by failing to request shipment of goods for long periods of time, despite repeated requests to do so (DX T, AD, and AE). Another way in which Textura took advantage was by failing to pay its invoices when due. The Court of Appeals referred to the repeated efforts by Clark-Schwebel to speed up payment, originally made with humor

* Textura's audited figures for year end 1964 show a negative working capital of $98,650 (PX 20) and a negative figure of $50,900 for the year end 1965 (PX 36).

and eventually with stronger measures, such as commencing, near the end of 1965, to charge interest on invoices more than 30 days old (App. A 3340).

Throughout the entire period of its dealing with defendants, Textura made numerous complaints regarding the quality of goods shipped by all its suppliers and sought to obtain allowances for the alleged quality defects (Tr. 979, 1488). While Textura was always satisfied with the adjustments given to it by Burlington and Stevens, it was not satisfied with Clark-Schwebel's handling of its claims (Tr. 653).

The pivotal event in Textura's relationship with Clark-Schwebel was Powrie's unilateral assertion by letter dated February 24, 1966, of the right to a $30,000 credit against its accounts payable to Clark-Schwebel because of alleged quality defects (DX AJ). Clark-Schwebel reacted quickly to this arbitrary action by the one customer for which it had always "bent over backwards" (Tr. 1528) and billed Textura on March 1 for all goods woven and ordered but not yet called out (approximately $90,000). Clark-Schwebel also put Textura on a cash basis for all future purchases, pending resolution of the dispute.

The first information received by Burlington regarding the controversy between Clark-Schwebel and Textura was on June 8, 1966 (PX 131), when Clark-Schwebel and Textura were each about to invoke the arbitration clause of their contracts to resolve the dispute. Burlington (and Stevens) evidenced a natural and justified concern for the viability of "financially thin" Textura, should it lose the arbitration and have to pay Clark-Schwebel $90,000. Textura was, however, at a meeting on July 29, able to reach a settlement of its dispute with Clark-Schwebel (PX 166), and acknowledged in the written settlement agreement a debt of some $70,000 to Clark-Schwebel (DX G). However, Textura never paid more than $5,000 called for by that agreement (Tr. 572). It continued to purchase goods from Clark-Schwebel in 1966 only on a cash basis (DX CK). In contrast, both Burlington and Stevens continued to extend not less than 60 days credit to Textura throughout 1966 (Tr. 652, 743, 2155).

As the Court of Appeals detailed at length, while Textura made only minimal purchases from Clark-Schwebel after March 1, Burlington's shipments to Textura increased substantially in the first seven months in 1966 over the comparable 1965 period (App. A 3346-48). Moreover, after Clark-Schwebel had refused to weave new contracts for Textura in early March pending resolution of their dispute, Burlington wove for Textura, among other fabrics, 25,000 yards of a fabric formerly obtained exclusively from Clark-Schwebel (App. A 3351).

In July, 1966, Textura's factor, Dommerich, had determined for reasons of its own to terminate its factoring arrangement with Textura and, as protection for sums advanced, built up and retained a large cash reserve in Textura's account in July and August, 1966. Powrie testified that Dommerich's building up of its reserves had a devastating effect on his "financially thin" operation in that "we didn't have cash to operate with" (Tr. 461-62). Dommerich's termination of its factoring agreement with Textura and Textura's inability to find a substitute factor, led to Textura's going out of business in December, 1966.

Twice at the end of plaintiffs' case the District Court ruled that there was no evidence that Dommerich had participated in a conspiracy with defendants (Tr. 1744-45, 1808-09).

Proceedings Below

At trial, the District Court reserved decision on defendants' motion for a directed verdict at the conclusion of plaintiffs' case. The case was submitted to the jury which, after four and one-half days of deliberation, returned a verdict against the respondents. Subsequently, respondents filed extensive motions for a directed verdict, for judgment *n.o.v.*, and for a new trial, which were denied in a memorandum opinion which spent only two paragraphs (App. B 2) dealing with the question of the sufficiency of the evidence.

In their briefs to the Court of Appeals, respondents raised numerous issues in addition to the question of the sufficiency of the proof of conspiracy. In light of its disposition of that issue, the Court of Appeals did not find it necessary to consider defendants' additional contentions that:

(1) there was insufficient evidence from which the jury could find that defendants' actions caused Textura to go out of business;

(2) the award of damages to Textura was based on pure speculation;

(3) fundamental errors in the charge required reversal;

(4) other errors in the conduct of the trial, relating to the receipt of prejudicial evidence and the absence of the trial judge during the concluding phase of the trial, required reversal.

Of course, if *certiorari* were to be granted, defendants would raise all these points in support of the judgment of the Court of Appeals. *Langnes* v. *Green*, 282 U.S. 531, 535-39 (1931); *Walling* v. *General Industries Co.*, 330 U.S. 545, 547 (1947).

ARGUMENT

Petitioner does not contend that any substantive principles of antitrust law were incorrectly understood or wrongly applied by the Court below. Moreover, petitioner concedes that a claim of misconstruction of the evidence by the Court of Appeals would not warrant this Court's review (Pet. p. 24). Petitioner instead raises a procedural argument: that this Court should declare a new rule of appellate review that whenever a trial judge declines to grant judgment *n.o.v.*, the Court of Appeals should not be permitted to exercise its normal supervisory function. We discuss this contention in Point I below.

Secondly, petitioner claims that the Court of Appeals ignored Textura's theory of the case. We demonstrate in Point II that this is in fact not correct. Indeed, petitioner's argument on this point is simply an attempt to recast the arguments presented to the Court of Appeals and rejected by that Court.

I

The Court of Appeals acted in accord with appropriate standards of appellate review.

Petitioner's first five Questions Presented (Br. pp. 2-3) are in fact a multiple repetition of one question: whether the Court of Appeals ignored established principles of appellate review—variously phrased in terms of Due Process (Question 1), the Seventh Amendment (Question 2), the Federal Rules of Civil Procedure (Question 3), general principles of appellate review (Question 4) and judicial administration (Question 5)—in holding that defendants' motions for a directed verdict and judgment *n.o.v.* should have been granted.

The Court of Appeals in fact spent several pages of its opinion discussing the proper standards of appellate review, and indeed cited the very cases which petitioner here emphasizes (App. A 3344-46, 3358-60). Thus, the Court of Appeals quoted from *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962) to the effect that it was "bound to view the evidence in the light most favorable to [the plaintiff] and to give [him] the benefit of all inferences which the evidence fairly supports, even if contrary inferences might reasonably be drawn." (App. A 3344).* The Court of Appeals further cited (App. A 3345) the cases of *Klor's, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Fashion Originators' Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941) relied on and cited by petitioner. Even more specifically, the Court of Appeals, after reviewing plaintiffs' principal contentions, went on to a discussion of "the other evidence" (App. A 3358-60). In such discussion, it specifically endorsed the point

* For specific examples of the Court's application of this principle, see App. A 3354, n. 12 and 3351-52.

urged by petitioner (Pet. p. 24) that a reviewing court should not limit itself to "pieces of the mosaic without viewing the evidentiary picture as a whole." (App. A 3359). In its discussion of the evidence as a whole, the Court again referred to petitioner's principal authority, *Continental Ore* v. *Union Carbide & Carbon Corp.* (App. A 3359).

Moreover, as to petitioner's claims that the issue of motive somehow requires special attention, the Court of Appeals after reciting the evidence on the subject (App. A 3358-59), concluded that "the evidence does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy against Textura" (App. A 3359). In so concluding, the Court of Appeals referred specifically to *First Nat. Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), in which this Court upheld a grant of summary judgment against plaintiff. There, plaintiff's theory of defendant's motivation to enter into an illegal conspiracy had similarly been rejected as a matter of law by the lower courts. Thus, there can be no contention that the Court of Appeals was somehow unaware of this Court's enunciated standards of appellate review.

Petitioner, however, would have a Court of Appeals confronted with a jury verdict and denial of judgment *n.o.v.* abdicate its function entirely and adopt "a rule that when a jury verdict is explicitly concurred in and approved by the trial judge, it will not be reversed on appeal on the sole ground that the facts do not sustain the verdict." (Pet. p. 26). The Court of Appeals itself provided a response to this contention.

> "If, however, after viewing all the evidence most favorably to plaintiff we cannot say the jury could reasonably have returned the verdict in his favor, our

duty is to reverse the judgment below. The jury's role as a finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial." (App. A 3344)

The restriction on the Court of Appeals' jurisdiction which petitioner here urges is contrary both to statutory authority and a long line of decisions of this Court. In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967), this Court specifically approved the Court of Appeals' reversal of a denial of a motion for judgment *n.o.v.*, and its direction of entry of judgment for the losing party below. Interpreting 28 U.S.C. §2106, this Court wrote:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.* See *Baltimore & Carolina Line, Inc.* v. *Redman, supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal. . . ." 386 U.S. at 322.

See also *United States* v. *Generes*, 405 U.S. 93 (1972), where this Court itself directed the entry of judgment *n.o.v.*, reversing a decision of the Court of Appeals, and similarly *New York, N.H. & H. R.R. Co.* v. *Henagan*, 364 U.S. 441 (1960).*

* Petitioner suggests that "findings" of the trial court in its memorandum (App. B) denying judgment *n.o.v.* in effect constitute findings of fact under Fed. R. Civ. P. Rule 52(a), which could not be overturned unless clearly erroneous (Pet. p. 2). The decisions of this Court provide that even trial court findings pursuant to Rule 52(a)

(footnote continued on next page)

It is respectfully submitted that there can be no quarrel with the standards of appellate review applied by the Court of Appeals.

II

The Court of Appeals fully considered and correctly rejected all of petitioner's factual contentions.

Since there is no claim raised that the Court of Appeals erred as to the applicable substantive principles of antitrust law and, as demonstrated above, there can be no question that the Court of Appeals did not act with full cognizance of the applicable standards of appellate review, petitioner's only possible claim is that somehow those principles were wrongly applied to the facts of this case. Whether or not such a claim in the abstract would merit the attention of this Court, a reading of the thorough and searching 27-page opinion of the Court of Appeals reveals that there is utterly no merit to petitioner's contention that the Court reached its decision "without taking into account either the verdict-winner's theory of his case, or the evidence which the jury, and the trial judge, regarded as controlling." (Pet. p. 2).

There would seem to be no better place to determine "the verdict-winner's theory of his case" than to consult its brief in the Court of Appeals. Petitioner was in fact granted permission by the Second Circuit to file a 137-page

must be overturned when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)), a standard similar to that applied by the Court of Appeals below. Moreover, the statements directed to the merits in the two-paragraph discussion by the trial judge in his opinion (App. B 2) are in such generalized, conclusory form that they could not qualify as the "special" findings of fact required under Rule 52(a).

brief to set forth that theory, which is summarized in the argument heading for Point I:

> "The evidence of defendants' motives, their opportunities to conspire, their frequent contacts and communications, their harmful actions against Textura, including restrictions on credit and refusals to accept or process orders, is sufficient to support the jury's determination that defendants conspired."

There can be no doubt in studying the careful opinion of the Court of Appeals, that each of the points emphasized by plaintiff below was considered at length by the Court of Appeals and plaintiff's arguments as to each item given their full weight.

A. The Alleged Refusal to Accept or Process Orders

The Court set forth in detail the facts with respect to the shipment of goods by Clark-Schwebel to Textura in 1966, and the contrasting record of the shipment of goods from Burlington to Textura, during the same period (App. A 3341-42, 3346-52). The Court noted the drastic reduction in the shipments by Clark-Schwebel after March 1, 1966, when Textura and Clark-Schwebel became engaged in the dispute which ultimately led to the filing of an arbitration demand (App. A 3347). Clark-Schwebel's shipments after March 1 never regained substantial volume primarily because Clark-Schwebel was demanding payment of its overdue bills (and thereafter payment under the settlement agreement) prior to shipping additional goods, and such payments were not forthcoming (App. A 3341).

On the contrary, Burlington's shipments in the early months of 1966 (when Clark-Schwebel and Textura were

engaged in the dispute), were higher than Burlington's 1965 average monthly shipments to Textura. As the Court pointed out:

> "Had Burlington and Clark-Schwebel been conspiring to coerce Textura into accepting Clark-Schwebel's demands, one would expect Burlington's shipments to be reduced similarly, thereby increasing the pressure on Textura to settle its dispute with Clark-Schwebel on terms unfavorable to Textura." (App. A 3347-48)

The Court then turned its attention to Textura's contention that after Textura had entered into the settlement agreement with Clark-Schwebel on July 29, the downward turn in Burlington's shipments to Textura (in August and September particularly) somehow could be considered conspiratorial. The Court, after reviewing the evidence (App. A 3349-50), concluded there was no evidence of collaboration on the part of Burlington and Clark-Schwebel relating to this trend and "[t]he record, furthermore, is clear that Burlington alone made the decision to hold up approval of the new orders, and for its own independent reasons. . . ." (App. A 3350). Burlington's decision which resulted in the temporary reduction of its sales to Textura had been made in March and April, long prior to June 8, when the information regarding Clark-Schwebel's dispute with Textura was first communicated to Burlington (App. A 3350). The reason for Burlington's decision was Powrie's refusal to renew his personal guarantee despite what Burlington had construed as a promise on his part to renew. The Court concluded:

> "The two companies followed wholly different policies in their sales of fabrics to Textura. Burlington had developed its policy long prior to the period of the

alleged conspiracy and did nothing to change it in response to Clark-Schwebel's switch to a harder line. Indeed Burlington's large shipments in the spring and summer would tend to undercut Clark-Schwebel's position." (App. A 3351)

In holding that Burlington's alleged refusal to accept or process orders did not provide a basis for concluding that a conspiracy existed, the Court also fully considered subsidiary contentions of petitioner with respect to Clark-Schwebel fabrics ("Homespun" and "Morro") which Burlington sought to weave (App. A 3351-52).

B. The Alleged Credit Restrictions

Similarly, the Court of Appeals considered at length petitioner's contentions regarding credit policies towards Textura and explicitly dealt with them in an orderly way. This is to be contrasted with the manner in which the argument is advanced in the petition: that is, setting forth isolated items from the record without placing them in chronological or other logical order.* The Court, after detailed discussion of the credit situation (App. A 3353-55), concluded:

"Far from indicating any conspiracy to pursue common credit policies designed to drive Textura out of

* For example, it is stated that Clark-Schwebel "initiated an interest charge on Textura's account for the first time" (Pet. p. 16). This statement is placed in a context that would indicate that this event occurred near the end of Textura's business life in 1966. In fact, Clark-Schwebel's initiation of interest charges, as the Court of Appeals noted, took place in December, 1965, four months before the alleged conspiracy is said to have begun (App. A 3340), and was done at a time when Textura's accounts payable had doubled from the previous year (DX BW), and when Textura had failed to call out goods which Clark-Schwebel had, six months before, requested be called out before December 31 (Tr. 781-82). In fact, the interest charges were never paid (see DX G).

business, the picture is just the opposite, with one creditor (Clark-Schwebel) adopting a procrustean policy while the other (Burlington) sought through leniency to capture some of the business being given up by the first." (App. A 3355)

C. Communications Between Defendants

The Court next considered the communications between Burlington and Clark-Schwebel, setting forth the substance of the discussions in detail in the margin of its opinion (App. A 3356, n. 16). The Court placed this evidence in context by referring to the opinions of this Court holding that "the exchange of information between business firms concerning the creditworthiness of customers has long been held not to violate the Sherman Act." *See, e.g., Cement Manufacturers Protective Association* v. *United States,* 268 U.S. 588 (1925). These authorities are not questioned by petitioner; rather, they are totally ignored.

After detailing the specific statements in each of the credit communications, the Court concluded that "the conversations concerning Textura do not support any inference that Clark-Schwebel and Burlington stepped beyond these permissible boundaries." (App. A 3357). The Court further said that these conversations "viewed with or without the balance of the evidence" were insufficient to support the verdict (App. A 3358).*

* Petitioner suggests that these credit exchanges were not carried out by "regular" credit men (Pet. pp. 12-13). However, petitioner's listing of the *dramatis personae* is totally inaccurate: Mr. Wilson was an officer of Stevens, never of Burlington (Tr. 1631); Mr. Clark died two years before the alleged conspiracy commenced (Tr. 235), and there was no claim or evidence that Messrs. Colton or Vollers ever participated in any conversation with anyone at Clark-Schwebel. Mr. Kelly, who was "a credit man all my life" (Tr. 1839) did have conversations with Messrs. Schwebel and Nordheim who acted as a *de facto* credit department because Clark-Schwebel had no credit men as such (Tr. 1137). The Court of Appeals took full cognizance of these conversations (App. A 3356, n. 16).

D. Plaintiffs' Other Claims, Including Motive

Finally, the Court turned to the supposed "other evidence." Unlike petitioner, however, the Court again placed the various statements gleaned from the 2500-page record,* and relied upon by petitioner here, in proper context. Thus, "the isolated statement of a Burlington official in 1964, two years before the alleged conspiracy, that he would be happy if Burlington did not deal with Textura, cannot be construed as an admission of participation in a conspiracy not planned or begun until years later, particularly in view of the fact that Burlington continued to do business with Textura up until the time of the latter's bankruptcy." (App. A 3358). The statement of the Burlington official is again featured in the petition (Pet. p. 11), but without reference to when it was uttered.

After examining petitioner's alleged proof of motivation, the Court concluded that the evidence, in sum, "does not reasonably support a finding of any motivation on Burlington's part to enter a conspiracy." (App. A 3359). As discussed above (pp. 4-5), petitioner's theory that Clark-Schwebel was motivated to drive Textura out of business because of antagonism to its method of selling direct is totally contradicted by the record. Petitioner's present

* On pages 13 to 16 of his petition, petitioner sets forth certain isolated quotations from the record, without indication when the events referred to occurred, or their context. It would take a brief three times this size to put each of those quotations in context but certainly the great majority of them—and certainly the items emphasized by petitioner's previous counsel—were specifically discussed by the Court of Appeals. *See, e.g.,* discussion of Item 1 at App. A 3340-41; Item 9 at App. A 3351, n. 11; and Item 17 at App. A 3340. Suffice it to say that a Court of Appeals, in order properly to fulfill its function, is not required to deal with every individual statement in a 2500-page record.

theory of Clark-Schwebel's motivation is something new, not argued to the Court of Appeals and totally without evidentiary support.

E. Petitioner's Additional Contentions

Petitioner further suggests that the Court of Appeals failed "to come to grips with the essential facts of the case." (Pet. p. 19). In fact, however, petitioner's references in support of this conclusion are not to "the essential facts" of the case, but to various statements by the Court with which petitioner takes issue. Petitioner's cavils, even if correct, would not justify the granting of certiorari; in fact, however, they are not correct.

First, petitioner refers to what he considers the Court of Appeals' negative view "of Textura as 'slow pay'." (Pet. p. 19). However, the sentence quoted from the Court of Appeals' opinion* accurately stated the facts. Petitioner would simply have the Court of Appeals ignore the further undisputed fact that "[o]ver the years each supplier periodically would press Textura to 'call out' fabrics sooner, and to speed up its payments for fabrics already delivered." (App. A 3338-39).

Second, petitioner raises an issue regarding Textura's financial position and its alleged sales and profits in 1966 (Pet. pp. 20-21). The Court of Appeals more than bent over backwards to accept Textura's factual position regarding

* "Furthermore, while the terms of the supplier's invoice required payment within 30 to 60 days, Textura rarely, if ever, met these terms; often it did not pay until 90 days or more after the invoice date, and on one occasion 140 days later." (App. A 3338).

the amount of its 1966 sales, rejecting Textura's bookkeeper's sworn admission that sales were increased by virtue of including in one month's figures the sales recorded in the next succeeding month until a total of $150,000 was reached for the first month (App. A 3354, n. 12). (Indeed this policy of distorting 1966 sales had been confirmed by Textura's principal, Powrie, on the witness stand (Tr. 804).) The Court of Appeals nevertheless accepted the sales and profits figures at face value, but pointed to what has never been disputed—that Textura's net asset position was so low that an unfavorable determination in the arbitration proceeding with Clark-Schwebel would have led to Textura's ruin (App. A 3353-54).

Third, petitioner suggests that an internal memo dated January 13, 1966, reporting a conversation between Kelly of Burlington and Nordheim of Clark-Schwebel on that date casts doubt on the conclusion that Burlington did not learn of Clark-Schwebel's termination of Textura's credit until June 8, 1966. However, what petitioner ignores is that the termination of credit did not occur until March 1, 1966, almost two months after the January 13, 1966 discussion, and could not have been a subject of that conversation.

Fourth, petitioner seeks to reargue the details of Burlington shipments to Textura which were discussed in great detail by the Court of Appeals (App. A 3346-52) and summarized above. (See pp. 14-16, *supra*.) To repeat, Burlington shipped large quantities of fabric to Textura at the time when the dispute between Textura and Clark-Schwebel was at its most critical point; and the later decline in shipments cannot be connected in any way with communication with

Clark-Schwebel. Moreover, petitioner is simply in error when he asserts that Burlington did not weave new orders for Textura after March 1, 1966 (Pet. p. 22); by August 25, 1966, Burlington's sales department had agreed to accept and weave all of the new orders which had been submitted by Textura (PX 548).

These specific items raised by petitioner are simply an attempt to reargue the facts. In fact, the Court of Appeals thoroughly considered all of petitioner's contentions below and, applying the appropriate standards of appellate review, rejected them.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 10, 1976

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